



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Air Pollution Control Permit
Issued to Murphy Oil, USA

Case No. IH-99-09

DECISION

On December 4, 1997, Murphy Oil, USA (Murphy Oil) applied to the Department of Natural Resources (Department) for an air pollution control permit for a unit covered by an expiring construction permit (Construction Permit No. 95-SDD-12). In September 1998, the Department issued a draft of the requested permit and noticed a public hearing on the application for October 21, 1998. The public hearing was held and on February 17, 1999, the Department issued a partial operating permit to Murphy Oil. On February 26, 1999, the permit was sent to the federal Environmental Protection Agency (EPA) for review and approval.

On February 25, 1999, Robert Browne and Katherine McKenzie filed a request for a contested case hearing on the permit issued to Murphy Oil. Ms. McKenzie subsequently withdrew her request for hearing; however, on April 19, 1999, the Department granted Mr. Browne's request for a contested case hearing. On March 20, 2000, the Dane County Circuit Court issued a Judgment for Absolute Writ of Prohibition limiting the scope of the hearing to a single issue. The issue, as stated by the court, is "the regulatory authority of the Wisconsin Department of Natural Resources to issue a partial air pollution operation permit." A prehearing conference was conducted in this matter and the parties agreed that the sole issue to be decided is a legal issue and that no evidentiary hearing was required in this matter.

A briefing schedule was established. Mr. Browne filed his initial brief on June 15, 2000; Murphy Oil filed a response brief on July 21, 2000; the Department filed a response brief on July 24, 2000; and, Mr. Browne filed a reply brief on August 23, 2000. Additionally, on September 15, 2000, Murphy Oil filed a letter enclosing a notice in the Federal Register of EPA's action approving a site specific revision to the Wisconsin sulfur dioxide State Implementation Plan for Murphy Oil.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Robert Browne, Petitioner, by

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Murphy Oil USA, Inc., Applicant, by

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Wisconsin Department of Natural Resources, by

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The sole issue to be decided is whether the Department has authority to issue a partial operation air pollution control permit. This issue has two components. The first component is whether Wisconsin Statutes authorizes the Department to issue partial operating permits. The second component is, if so, is this authority consistent with federal Clean Air Act (CAA) requirements.

The parties agree that pursuant to sec. 285.60, Stats., Murphy Oil is required to obtain an air pollution control permit for its oil refinery in Superior. The dispute is whether the Department can issue a permit for a portion of the facility while the application for the entire facility is pending. The partial operating permit at issue was issued to Murphy Oil to cover a Fluid Catalytic Cracking Unit, Process P31, S15, which had been issued a construction permit that was expiring, and for units for which Murphy Oil had requested alternative emission limits and which the Department had previously approved.¹ The Department argues that it has

¹ Murphy Oil requested the alternative emission limits in 1985. The Department completed an analysis of the request, dated August 1988, which concluded that "Murphy Oil has complied with all six of the criteria necessary to obtain an alternate sulfur dioxide emission limit." The Department indicated in a letter dated September 14, 1988, addressed to Murphy Oil that the alternate sulfur dioxide emission limit would be incorporated into the operation

authority to issue a partial operating permit because it considers the units covered by the subject permit a “stationary source.”

"Stationary source" is defined at sec. 285.01(41), Stats., as “any facility, building, structure or installation that directly or indirectly emits or may emit an air contaminant only from a fixed location. A stationary source includes an air contaminant source that is capable of being transported to a different location. *A stationary source may consist of one or more pieces of process equipment, each of which is capable of emitting an air contaminant.* A stationary source does not include a motor vehicle or equipment which is capable of emitting an air contaminant while moving.” (emphasis added) For permitting purposes, the Department has historically interpreted the definition of a “stationary source” as including an individual emission unit, several emission units, or a group of emission units constituting an entire facility.

The Department considered the units for which the subject partial operating permit was issued a stationary source. The Department’s long standing interpretation of the definition of a “stationary source” includes permitting a portion of a facility. Although there is no express statutory reference to a partial operating permit, the Department’s interpretation is reasonable and is not contrary to any statutory provisions. Under Wisconsin law, the Department does have authority to issue an air pollution control permit that only covers a portion of a facility. The next issue is whether the Department’s interpretation of the definition of a stationary source is consistent with the CAA.

Although neither the Department nor Murphy Oil in their briefs have cited any provisions of the CAA or federal regulations that expressly authorize or refer to partial operating permits, this concept is recognized by the EPA and is not inconsistent with the federal regulatory framework. The legislative history of Title V of the CAA provides support for the proposition that a state agency may issue multiple permits to a facility with multiple emission units. As quoted in the Department’s and Murphy Oil’s response briefs the report of the Senate Committee on Environmental and Public Works on S. 1630, S. Rep. No. 228, 101st Congress, 1st session (1989) includes the following statement:

Furthermore, state programs may provide for issuing one air permit to a facility with multiple sources of air pollution so long as there is no compromise in the clarity of emission requirements. Thus, for example, a source with many small emissions points could receive a single air permit specifying any applicable emissions limits or work practice standards. However, consistent with the overall principle of maintaining existing State permit programs to the extent possible, and the need for certainty and clarity, *EPA may authorize States, if they choose, to issue multiple permits to plants with multiple emission points* (although States may not redefine which sources are subject to this title through the issuance of multiple permits). (emphasis added)

permit for Murphy Oil. Apparently no operation permit was ever issued in response to the application Murphy Oil had filed prior to 1988. In response to amendments to the CAA, the Wisconsin state legislature revised the state air pollution permitting laws and the Department promulgated a new operating permit rule that became effective on January 1, 1994. On June 30, 1994, Murphy Oil applied for an air pollution control permit under the new rules for its Superior facility. No permit has been issued in response to this application.

The EPA did chose to authorize states to issue multiple permits to plants with multiple emission points. The preamble to the proposed EPA regulations provides:

Some States prefer to permit by emissions unit, especially large sources with many emissions units. As long as a collection of individual emissions unit permits assure that all applicable requirements would be met which would be required under a permit for the whole source, and the State permits the entire source according to the Act's schedule, the State may permit each unit individually, or in groups within a source. Where feasible, the entire facility should be permitted at one time. States are encouraged to permit at least all logical or similar emission units at the same time.

56 Fed. Reg. 21727 (May 10, 1992).

While not conceding that the CAA and EPA regulations allow states to issue partial operating permits, Mr. Browne also contends that even if it does, the subject permit does not satisfy EPA requirements for such a permit and the subject permit should be declared invalid. The basis of this contention is that other parts of the Murphy Oil facility are allegedly not in compliance with sulfur dioxide emission limits (as evidenced by the notices of violation issued to Murphy Oil for this facility and an enforcement action filed by the Department against Murphy Oil) and because the partial operating permit does not include a schedule by which the entire facility will be in compliance with applicable emission limits. Mr. Browne argues that the language "[a]s long as a collection of individual emissions unit permits assure that all applicable requirements would be met which would be required under a permit for the whole source" in the preamble to the proposed EPA regulations means that a partial operating permit may only be issued if the entire facility is in compliance with emission limits.

Mr. Browne's interpretation of the quoted language is overly restrictive. The language appears to require only that the individual groupings permitted must meet the applicable requirements for the units permitted. It would make the permitting of individual units meaningless if the EPA regulations required that a partial operating permit may only be issued to an applicant if the applicant's entire facility can be permitted at the same time. The most logical interpretation of the requirement is that when all the subunits of a facility are permitted, the facility as a whole shall not exceed applicable emission limits. However, even if one accepts Mr. Browne's interpretation of the language, whether other units of the Murphy Oil facility are in compliance with applicable emission limits is a question of fact that is beyond the scope of this proceeding. No evidentiary hearing was conducted in this matter and there is no record upon which such a finding could be made.

In summary, although no express authority for the issuance of partial operating permits exists, the issuance of partial operating permits is consistent with the Wisconsin statutes regulating the issuance of air pollution control permits and is not contrary to any provisions of the CAA or EPA regulations.

Dated at Madison, Wisconsin on September 26, 2000.

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By: _____
MARK J. KAISER
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.